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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 77-1319

Joseph D. Smith
Clayton L. Hummel, Petitioners,

-vs-

State of Indiana, Respondent

****

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

****

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Petitioners, Clayton L. Hummel and Joseph D. Smith, by their counsel, Joseph M. Johnson, respectfully submit this brief in support of their Petition for Writ of Certiorari, filed herein on March 20, 1978.

This brief is filed pursuant to Supreme Court Rule 24(5) which provides:

> "Any party may file a supplemental brief at any time while a petition for writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of his last filing."

On January 31, 1978, the Indiana Court of Appeals rendered a decision in a cause entitled: "Clark v. State (1978) ____ Ind. App. ____, 372 N.E. 2d 185." This decision, although rendered and

dated January 31, 1978, has not been reported in the official reports of the Indiana Court of Appeals, however, was reported in the West Publishing Co., North Eastern Reporter (Second Series) advance sheet, dated March 8, 1978, which was not received by petitioners' attorney until after the time when petitioners' petition was delivered to a printer for printing. Therefore, this decision was not available to petitioners until after the filing of their petition herein.

Although, the Indiana Court of Appeals was considering a different aspect of the Indiana Implied Consent Statute in Clark v. State, supra, the Court again dealt with the applicability of the statute in criminal prosecutions for driving while under the influence of intoxicating liquor - causing death of another person (Ind. Code 9-4-1-54(b)(1), the offense for which petitioners were arrested and charged.

In spite of the clear language of the Indiana Implied Consent Statute and in complete disregard to its prior judgments in the cases Klebs v. State (1974) ____ Ind. App. ____, 305 N.E. 2d

781, and Jones v. State (1974) ____ Ind. App. ____, 315 N.E. 2d 403, in the judgment sought to be reviewed, the Indiana Court of Appeals held that:

> (1) It was not necessary for arresting officers to first offer petitioners the opportunity to submit to a "chemical test" for intoxication, as defined in Ind. Code 9-4-4.5-2(d), before arresting them for violations of Ind. Code 9-4-1-54(b) (Appendix A, p. 7);
>
> (2) The failure of the arresting officers to offer petitioners the opportunity to submit to a "chemical test" for intoxication in no way affected the validity of their arrest (Appendix A, p. 10);
>
> (3) The only purpose for implementing the "mandates" of the Implied Consent Statute was for the revocation of driving privileges for a period of one year (Appendix A, p. 10 and 17); and
>
> (4) The results of the tests of blood samples extracted from petitioners' bodies, which were not "chemical tests" as defined in Ind. Code 9-4-4.5-2(d) and which were not administered and performed by persons "certified as valid chemical test operators" as required by Ind. Code 9-4-4.5-3, were admissible as evidence in the trial court's probable cause for arrest determinations. (Appendix A, p. 16)

Commencing with the Motions to Dismiss filed by petitioners, in the trial court,

and through this entire proceeding, inter alia, petitioners have asserted that, pursuant to the Implied Consent Statute:

> (1) They had an absolute right to and it was necessary that petitioners be offered the opportunity to submit to a "chemical test", i. e., a test defined in Ind. Code 9-4-4.5-2(d) before their arrest;
>
> (2) The failure of the arresting officers to offer petitioners the opportunity to submit to a "chemical test" rendered their arrests illegal as in violation of the Fourth Amendment to the Constitution of the United States;
>
> (3) The purposes of the implied consent statute were to assure the accuracy and reliability of chemical tests, to impose strictures and requirements on the use of chemical tests as evidence in prosecutions for driving while under the influence of intoxicating liquor and related offenses contained in Ind. Code 9-4-1-54(b), and to protect innocent persons from being subjected to the jeopardy of prosecutions for such offenses, rather than, the mere revocation of driving privileges in instances where persons refuse an offered opportunity to submit to a test; and
>
> (4) The tests of the blood samples extracted from petitioners' bodies were not "chemical tests" within the statutory definition of such term in Ind. Code 9-4-4.5-2(d), therefore, the

> extractions and tests were illegal searches and seizures under the Fourth Amendment to the Constitution of the United States and were inadmissible as evidence, for any purpose.

The case of Clark v. State (I978) ____ Ind. App. ____, 372 N.E. 2d 185, clearly follows petitioners' arguments. Most significantly, the Court held that the Implied Consent Statute was applicable in prosecutions for driving under the influence, reckless homicide and causing death while driving under the influence, and recognized that under the Implied Consent Statute, before a person can be arrested, he must be offered the opportunity to submit to a chemical test for intoxication, as required by Ind. Code 9-4-4.5-3. Two aspects of the opinion should be noted: First, the opinion was written by the same division of the Indiana Court of Appeals, it having three divisions, which wrote the opinion sought to be reviewed. Second, the person who made the "chemical test" of the subject's blood in the Clark case, Lt. Paul Assa of the Indiana State Police, was the same person who performdd the test of petitioner, Smith's, blood sample; however, at the time Lt. Assa made the test in the Clark case, he was a "certified chemical test

operator" (372 N.E. 2d at 187), and at the time he performed the test of Smith's blood sample, he was not a "certified operator".

The facts in Clark v. Smith, supra, were as follows: After a motor vehicle accident, as result of which persons were killed, Clark, one of the drivers, was taken to a hospital. At the hospital, a police officer asked Clark to submit to the taking of a blood sample for a blood test, to which Clark agreed, orally and in writing. A blood sample was extracted and tested, apparently by Lt. Paul Assa, a "certified chemical test operator". Clark was subsequently arrested, charged and convicted. At Clark's trial, Lt. Paul Assa, a "certified chemical test operator", testified that the blood sample had an alcohol content of .283%. On appeal, Clark contended that the trial Court erred in allowing admission of evidence concerning the chemical analysis of the blood sample extracted from his body, for the reason that his consent to the taking of the blood sample was not made knowingly and voluntarily. Therefore, Clark's challenge to the admissibility of such evidence is on different grounds than those asserted

by petitioners here, nevertheless, the rationale of the Court and the basis for reviewing the question for admissibility of such evidence is relevant here.

In commencing its review of the question, the Court commenced by referring to and quoting Ind. Code 9-4-4.5-1 (portion of the Statute which states that driver's impliedly consent to a chemical test), Ind. Code 9-4-4.5-2(d) (portion of the statute which defines the term "chemical test") and Ind. Code 9-4-4.5-3 (portion of the statute which provides that a person shall be offered the opportunity to submit to a chemical test before being placed under arrest and if the test results in prima facie evidence that the person is not under the influence, he shall not be arrested for such offense but shall be released immediately).

The Court, after reviewing the above portions of the Implied Consent Statute, stated:

> "The statutory provisions set forth in the Implied Consent Statute apply not only to the crime of Driving Under the Influence but also to the crimes of Reckless Homicide and Causing a Death While Driving Under the Influence, the crimes for which Clark was convicted here.

> Pursuant to the provisions of this act, Clark was not placed under arrest at the time Trooper Boaz asked him to consent to the taking of a blood sample." (372 N. E. 2d 185 at 189)

Such observations of the Court, while totally correct, collide violently with the judgment here sought to be reviewed, where the Court observed and stated:

> "The trial court was of the opinion that before an arrest could be lawful, it was necessary for the arresting officer to first accord the arrestee an opportunity to submit to a chemical test to discover the extent, if any, of the driver's intoxication (Appendix A, p. 7)
>
> * * * *
>
> The failure of an arresting officer to accord the individual arrested an opportunity to be chemically tested for the presence of alcohol in his blood in no way affects the validity of his arrest." (Appendix A, p. 10)
>
> * * * *
>
> "Hummel and Smith contend the affidavits were insufficient because based in part on the results of an illegal search and seizure ...
>
> At the outset we reject Hummel's and Smith's contention that the blood tests could not properly be considered by the magistrate solely because the

> arresting officer did not comply with the Implied Consent Statute by first offering Hummel and Smith the opportunity to take a test before being placed under arrest, and because the equipment and test operator were not properly certified. (Appendix A, p. 16)
>
> * * * *
>
> Therefore, since the probable cause affidavits were not used for the purpose of implementing the mandates of the Implied Consent Statute, i. e., the revocation of driving privileges for a period of one year, the trial court erred in considering the results of the blood tests for the reasons argued by Hummel and Smith." (Appendix A, p. 17)

The Clark, decision is in complete allign with the Court's decisions in Klebs and Jones, which are cited and thoroughly discussed in petitioners' petition, and further accentuates the invidiousness of the discriminatory and arbitrary treatment of petitioners, affected by the judgment of the Indiana Court of Appeals sought to be reviewed, in violation of their rights to due process and equal protection of the law, guaranteed to them under the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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